

**Before the  
Federal Communications Commission  
Washing, D.C. 20554**

In the Matter of	)	
	)	
Improving Public Safety Communications in the	)	WT Docket 02-55
800 MHz Band	)	
	)	
Consolidating the 800 and 900 MHz	)	
Industrial/Land Transportation and Business Pool	)	
Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules	)	ET Docket No. 00-258
To Allocate Spectrum Below 3 GHz for Mobile	)	
And Fixed Services to Support the Introduction of	)	
New Advanced Wireless Services, including Third	)	
Generation Wireless Systems	)	
	)	
Petition for Rule Making of the Wireless	)	RM-9498
Information Networks Forum Concerning the	)	
Unlicensed Personal Communications Service	)	
	)	
Petition for Rule Making of UT Starcom, Inc.,	)	RM-10024
Concerning the Unlicensed Personal	)	
Communications Service	)	
	)	
Amendment of Section 2.106 of the Commisions's	)	ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for use by	)	
The Mobile Satellite Service	)	

**INTRODUCTION & SUMMARY**

My name is Charles D. Guskey and I am a stake holder in Preferred Communications Systems, Inc. and Preferred Acquisitions, Inc. (hereinafter collectively referred to as "Preferred"). As a stake holder in Preferred I am an interested party in this FCC proceeding (WT Docket 02-55).

This is a petition for reconsideration of the FCC Report and Order (R&O) released on July 8, 2004 in proceeding 02-55. This is a proceeding regarding interference with public safety within the 800 MHZ band. The purpose and focus of the petition of reconsideration is that the report and order violates the Communications Act of 1934, as amended, in particular sections 309 and section 257. The manner in which the Report and Order violates the Communications Act is that is anti competitive and discriminatory in regards to its treatment of Nextel in comparison to other 800 MHZ licensees, at the same time the Report and Order provides excessive benefits to Nextel, it is exceeding detrimental to other 800 MHZ licensees in particular those holding economic area ("EA") licenses.

There is no justification for the excessively favorable treatment for Nextel. This is particularly true because, based on the record, Nextel clearly was the primary cause of interference to public safety and the resolution of that interference was within Nextel's ability to control.

**1. OVER VIEW AS TO WHY THE COMMISSION MUST ADOPT THE SUGGESTED CHANGES IN THE PETITION.**

- A. The R&O fails its objective (as stated in Paragraph 5 of the R:O) "To ensure, that by these actions Nextel, other licensees and the public are treated equitably, and that Nextel does not realize any windfall gain"
- B. Preferred is entitled to equitable treatment. Preferred participated in FCC Auction #34 where it (1) out-bid Nextel for individual licenses in 10 each markets covering 29 million pops; (2) In 9 of those 10 markets, Preferred acquired as

many, or more licenses than Nextel; (3) Preferred Gross Winning Bids in the 10 markets (\$48.7 million) was nearly twice the amount of Nextel's winning bids (\$25.7 million) in these 10 markets.

- C. There is no justification for Nextel receiving any favorable treatment. (1) Nextel is the primary cause of public safety interference. (2) Nextel could resolve interference problems without massive, nation wide re-banding.
- D. The FCC could have, and maybe should have, simply enforced its existing regulations regarding interference and required Nextel to eliminate any and all interference. Thus, by not imposing such actions, and instead, adopting a plan that allows Nextel to reconfigure its spectrum and acquire additional spectrum, the FCC has provided a significant benefit to Nextel above and beyond the "value-for-value" calculations.

## **2. THE FCC'S UNDER VALUATION OF THE 10 MHZ OF 1.9 GHZ AT \$4.8 BILLION GIVES NEXTEL A WIND FALL IN EXCESS OF \$1 BILLION.**

The determination of the value of the 1.9 GHz this was a particular contiguous issue throughout the proceeding and the FCC concluded that the best means of determining the value of the 1.9 GHz was to look at two recent transactions.

The FCC determined the dollar per MHZ per pop calculation for each of these two transactions, it then calculated the simple average of these two and then added a 5% premium for Nextel being provided with nationwide spectrum. The two transactions that the FCC looked at were the Verizon/Northeast transaction which included approximately

47 million licenses pops with a total purchase price of \$750 million dollars, which translated to \$1.58 per MHz per pop. The second transaction (Fall 2003) was the Cingular/Next Wave which included approximately 84 million license pops in a transaction valued at \$1.4 billion dollars which translated to \$1.66 per MHz per pop. The average of the \$1.58 and the \$1.66 equals \$1.62 then FCC applied at 5% premium to arrive at the \$1.70 per MHz per pop which was then used to value the 1.9 GHz.

The Report and Order makes reference to more recent transactions but merely indicates that these transactions serve to confirm their conclusion in using the two transactions that were actually part of the FCC calculation. Unfortunately the FCC's logic in this analysis is fatally flawed. The flaw in the FCC logic is that more recent transactions clearly indicate that the MHz per pop value of \$1.70 is far too low. One of the more recent transactions that are particularly noteworthy is the sale Next Wave licenses.

On July 8, 2004 there was an auction conducted whereby three licenses of Next Wave were sold, one in the New York market and two in Florida markets. This was particularly noteworthy because Next Wave was in bankruptcy and as a result the auction was under the review of the bankruptcy court. The Next Wave documents in their bankruptcy filing indicate that the terms and conditions of the auction were approved by the bankruptcy court and it included the FCC's input. In this auction they established a minimum bid which is equal to 50% of the FCC auction 35 price for these markets. This is noteworthy because the auction 35 average price was \$4.18 per MHz per pop. Even though the auction 35 transactions were not consummated as a result of the Next Wave bankruptcy

proceeding nonetheless the various bidders in good faith bid the amounts as they did and there could be no doubt that if the Next Wave bankruptcy did not take place the FCC would have received those monies from the various bidders.

The most noteworthy auction purchase on July 8, 2004 was Verizon purchase of the New York 10 MHz license. Verizon bid and will pay \$930 million dollars for New York license alone. This is particularly noteworthy because the transactions selected by the FCC for determining 1.9 GHz value (the Verizon/Northeast transaction) included a 10 MHz license for New York. As noted above this transaction was for a total of \$750 million dollars (not only the New York license but also other licenses). There is a clear discrepancy in the FCC using the Verizon/Northeast transaction because it was only \$750 million (even though it included the New York license).

To determine a revised calculation (in essence adjusting the transaction selected by the FCC) one can look to a valuation report filed by Nextel whereby it included an allocation of the \$750 million dollars in the Verizon/Northeast transaction. Their schedule indicated that their value for the New York licenses was \$481 million dollars. The simple adjustment to the FCC calculation would be to replace the value for the New York license in that you would remove the \$481 million and replace it with the \$930 million.

This simple adjustment results in the value of \$2.52 per MHz per pop. Using this as the revised transaction value in the first transaction the FCC included in their calculation and adding that to second transaction they used results in a simple average of \$2.09 per MHz

per pop. Applying the 5% premium to this number results in \$2.19 per MHZ per pop. Applying that to the 286 million pop results in a total value of approximately \$6.3 billion dollars which is \$1.5 billion dollars greater than the FCC had valued the spectrum.

The reasonableness of the \$6.3 billion revised valuation can be seen in the Verizon offer for the purchase of the spectrum at \$5 billion dollars. The \$5 billion dollars was going to be Verizon's initial bid should the spectrum have been auctioned and one can assume they would have increased their initial purchase. The \$6.3 billion dollars reflects what would have been a 25% higher bid should those have gone to auction.

Another recent transaction that should be taken into consideration is Verizon's agreed purchase of additional Next Wave licenses. Verizon has announced that they will be purchasing a total of 102 million licenses pops for a total of \$3 billion dollars. This calculates to \$2.94 per MHZ per pop. However we believe that this number is on to the high side since this transaction includes two licenses for the New York market. If one assumes that the \$930 million dollar purchase price from the July auction would be the value assigned to the two New York licenses in the more recent \$3 billion dollar transaction, one can take the \$3 billion dollars minus two times \$930 million dollars which leaves \$1.1 billion for the remainder of the licenses pops that are being acquired, which is 63 million license pops. This translates to dollars per MHZ per pop of \$1.82. Thus, this transaction suggests that the value of nationwide spectrum can be determined by separating the New York licenses at \$930 million dollars and then apply \$1.82 per MHZ per pop to the remainder of licenses pops which would be \$1.82 times approximately 266 million pops which results in a total of approximately \$5.8 billion dollars. However this

does not reflect any premium for nationwide spectrum, thus a 5% increase or premium would result in a approximately \$6.1 billion dollars for the nationwide spectrum which translates to \$2.12 per MHz per pop which is very close to the \$ 2.19 calculation decision above.

### **3. THE FCC'S OVER VALUATION OF NEXTEL'S 800 MHZ SPECTRUM GIVES NEXTEL A WIND FALL IN EXCESS OF \$1.2 BILLION.**

The FCC values Nextel's General Category spectrum at \$1.70 per MHz/pop, however it uses a discounted value of \$1.49 per MHz/pop for the interleaved Spectrum. This is a 12.5% discount due to an estimate of restricted use due to adjacent channels. There is no justification for not using the discounted value of \$1.49 for the General Category channels since (1) Nextel claims to have an average of approximately 4.5 MHz of the General Category spectrum, which is only 60% of the General Category spectrum. (2) The remaining 3.0 MHz air primarily site-specific licenses that are randomly scattered through out the band, thus a significant portion of Nextel's General Category spectrum are subject to adjacent channel restrictions. (3) This spectrum configuration is confirmed by reviewing the FCC report to Congress regarding 800 MHz spectrum, which is in the record in this proceeding.

Using the appropriate value of \$1.49 for the General Category spectrum (instead of the \$1.70) reduces the valuation of Nextel's spectrum by \$270 million ( $\$1.70 - \$1.49 = \$0.21 \times 286 \text{ million} \times 4.5 \text{ MHz} = \$270 \text{ million}$ ).

The FCC's determination of a 12.5% discount applied to full spectrum value of \$1.70 is based on only an immediately adjacent channel restriction . Thus it does not take into

account other forms of interference (eg OOB and intermodulation) which also restrict s Nextel's channel usage. Thus, the 12.5% discount is too low. An additional discount of at least 25% is reasonable. This additional 25% discount reduces Nextel's spectrum valuation by \$547 million ( $\$1.70 \times 25\% \times 4.5 \text{ MHz} \times 286 \text{ million} = \$547 \text{ million}$ ) for the General Category spectrum and \$426 million ( $\$1.49 \times 25\% \times 4.0 \text{ MHz} \times 286 \text{ million} = \$426 \text{ million}$ ) for the relinquished spectrum (middle 80 of 2.96 MHz and BIL of 1.04 MHz).

**4. THERE IS NOT JUSTIFICATION FOR GIVING NEXTEL A "RESTRICTED USE" CREDIT FOR A PORTION OF NEXTEL'S NEW SPECTRUM ALLOCATION. THIS IS A WIND FALL OF \$243 MILLION.**

The FCC's valuation formulas indicate that 1 MHz of Nextel's spectrum at the band edge will have reduced utility. Thus they apply a 50% discount to this 1 MHz, which at \$1.70 per MHz/pop and 286 million pops is a \$243 million discount. This is inappropriate since there is a Guard Band and an Expansion Band adjustment to Nextel's spectrum. Furthermore, a 50% discount of 1 MHz (20 paired channels) is excessive in comparison to the FCC's discount of Nextel's "relinquished" spectrum which only had immediately adjacent channels discontinued.

**5. THERE IS NO JUSTIFICATION TO GIVING NEXTEL CREDIT INSTALLING NEW FILTERS. THIS IS A \$150 MILLION WIND FALL.**

Nextel claims they will spend \$150 million for filters in order to comply with the "new" interference regulations. The idea of giving a licensee a "credit" for costs incurred in complying with FCC regulations is unjustified. Various new regulations have resulted in significant costs to licensees. Example in the wireless industry include E911, CALEA and local number portability. The additional filters should be viewed as a compliance cost that does not qualify for a credit by Nextel.



**6. NEXTEL SHOULD NOT RECEIVE LICENSES FOR THE 1.9 GHZ SPECTRUM OR THEIR NEW 800 MHZ CHANNELS UNTIL THEY COMPLETE THEIR PART OF THE BARGAN.**

The R&O is giving Nextel the 10 MHz of 1.9 GHz spectrum (valued by the FCC at \$4.8 Billion) and new channel assignments at 800 MHz in “exchange” for Nextel’s “relinquishing” an average of 4.5 MHz of 800 MHz spectrum and paying for relocation costs, any difference will be paid to the U. S. Treasury as an anti-wind fall payment. It is anti-competitive for Nextel to receive its new spectrum before it relinquishes its old spectrum and pays for the relocation. If it is not done in this manner, the FCC will put itself in a position similar to the Nextwave licensing quagmire.

This quid-pro-quo can be done on a NPSPAC region-by-region basis.

**7. THE FCC MUST CLARIFY THE GRAY AREA OF “NEXTEL, INC.” AND “NEXTEL PARTNERS, INC.” SPECIFICALLY ARE THEY BOTH: (1) RELINQUISHING SPECTRUM ? (2) GAINING ACCESS TO 1.9 GHZ? AND (3) PAYING RELOCATION COST?**

The total U.S. population being used in this proceeding is 286 million. Based on Nextel Partner, Inc.’s December 31, 2003 SEC Form 10-K, they have licenses for 53 million pops (approximately 19% of the U.S.). Thus, Nextel can have, at most, 233 million pops (approximately 81% of the U.S.). However, Nextel’s claim is that it is entitled to credit for 286 million pops for the spectrum it is relinquishing. How and why does Nextel, Inc. get a credit for Nextel Partner, Inc.’s spectrum holding? Nextel claims they are entitled to a \$2.1 billion credit (for relinquish spectrum) to be applied toward their acquisition of the 1.9 GHz spectrum, however it appears that Nextel Partners, Inc. (not Nextel, Inc.) owns 19% of this

spectrum, thus Nextel Partners, Inc. will incur a loss of \$400 million (\$2.1 billion x 19%) of spectrum with no compensation.

#### **8. THE AUTHORITY AND RESPONSIBILITY OF THE TRANSACTION ADMINISTRATOR (TA) NEEDS MODIFICATION.**

The R&O provides for the TA to monitor and audit Nextel's relocation expenditures, but provides little or no guidance as to what Nextel's "allowed" expenditures might be. The FCC should specify that Nextel's allowed costs are only for returning, and do not include any infrastructure or equipment that has any benefit to Nextel beyond the returning phase. Otherwise, the potential for Nextel to abuse the process exists.

#### **9. EQUITABLE TREATMENT OF PREFERRED MUST REFLECT THE FOLLOWING:**

- A. Preferred has been damaged as a result of this proceeding (02-55). Within a year of Preferred acquiring its EA licenses in FCC Auction #34, this proceeding commenced and the NPRM presented re-banding proposals that would remove Preferred for the 800 MHz band. Throughout the proceeding, the Consensus Parties proposals had Preferred moving to the non-cellular band. To this day, Nextel is campaigning for Preferred to be moved to the non-cellular band. Consequently, Preferred was effectively precluded from developing its systems since it would be fiscally imprudent to launch any system, given the uncertainties of this proceeding.

- B. Preferred acquired cellular eligible spectrum in FCC Auction #34, EA licenses in 10 markets covering 29 million pops.
- C. Preferred's General Category EA licenses provide it with the right to any and all encumbered frequencies within its block of frequencies to the extent that any underlying site licenses is removed.
- D. The R&O moves General Category site licenses to the non-cellular band and requires Nextel to relinquish all of its site licenses (and is providing other compensatory benefits) to Nextel, thus Preferred , under the??? to R&O is merely recovering clean access to frequencies for which it acquire the rights in the Auction. Thus, it must receive clean channels in the cellular block equal in number to the blocks of channels acquire in the Auction.
- E. The FCC has no choice but to treat Puerto Rico as a unique market. The FCC's plan in the R&O is based on Nextel having an average of 18.5 MHz of 800 MHz spectrum in all markets, and that Nextel is relinquishing an average of 4.5 MHz. In Puerto Rico, Nextel claims to have only 4.5 MHz, thus they are relinquishing all of their 800 MHz spectrum in that market. Accordingly, Preferred (as the largest 800 MHz licensee in that market) should be awarded the 1.9 GHz former NPSMC spectrum in exchange for paying for the relocation of public safety systems in that market.
- F. Preferred should be given equal access to the 1.9 GHz section in its markets.

Respectfully Submitted

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